U.S.
MAR 8 - 2010

No. 09-799

IN THE

Supreme Court of the United States

ERIC L. DAVIES AND MIRELLA M. DAVIES,

Petitioners,

v.

DAVID T. MOYSA AND JANE F. MOYSA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Petition should be dismissed for lack of jurisdiction since the amended injunction order expired by its own terms on January 4, 2010.

II. Whether Petitioners have presented compelling reasons to grant the Petition, where the decision of the Intermediate Court of Appeals affirming the State of Hawaii district court's entry of the amended injunction order does not conflict with a decision of this Court or a Court of Appeals, or implicates an important federal question that has not been settled by this Court.

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INTRODUCTION

Petitioners have presented no "compelling reasons" for their Petition for Writ of *Certiorari* to be granted (the "Petition") *See* Sup. Ct. R. 10. Specifically, Petitioners fail to demonstrate that the Summary Disposition Order of the Intermediate Court of Appeals (Pet. App. F) and the Summary Disposition Order of the Hawaii Supreme Court (Pet. App. B) are in conflict with a decision of this Court or another Court of Appeals or that the Hawaii Appellate Courts decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

I. Procedural History

On November 2, 2006, Respondents filed with the District Court of the First Circuit, Honolulu Division, State of Hawaii, a Petition for *Ex Parte* Temporary Restraining Order and for Injunction Against Harassment against Petitioners Eric L. Davies and Mirella M. Davies. On November 8, 2007, Petitioners filed a separate a Petition for Ex Parte Temporary Restraining Order and for Injunction Against Harassment. Hearings on the petitions were conducted, and on January 4, 2007 the district court denied the Petitioners' petition for TRO, and, at the same time, the court issued an order granting petition for injunction against harassment in favor of the Respondents. At that

time, default was entered against Petitioner Mirella M. Davies for failing to appear at the hearings.

The Order Granting Petition for Injunction Against Harassment filed January 4, 2007, stated in pertinent part:

> 2. Respondent(s) [the Davies] and any other person acting on behalf of Respondent(s) are hereby retrained and enjoined from:
>
> A. Contacting, threatening or harassing Petitioner(s). Contacting is defined to include but is not limited to the telephone, mail, facsimile, pager, electronic mail, internet, etc.
>
> B. Contacting, threatening or harassing any person(s) residing at Petitioner's residence.
>
> C. Entering and/or visiting Petitioner(s)' residence, including yard and garage, and/or place of Petitioner(s)' employment.
>
> * * * * *
>
> 5. *Special conditions or modifications:* (1) Respondents shall not play any music, sermons or any else on a

> television, stereo, or other sound reproduction device such that the sound can be heard on the Petitioner's property at a level greater than 55 decibels during the hours of 7:00 a.m. to 10:00 p.m., or at a level greater than 45 decibels during the hours of 10:00 p.m. to 7:00 a.m. as provided by Hawai'i Administrative Rules Section 11-46-4. (2) Respondents shall not make any statements to any third party regarding the Petitioner; provided, however, that Respondents may conduct business or file complaints with the homeowner's association.

The injunction was effective as of January 4, 2007 and remained in effect for a period of three years, or until January 4, 2010.

Due to repeated violations of the Injunction Order, Respondents filed a Motion for Issuance of Order to Show Cause on May 22, 2007.

On July 3, 2007, Petitioners filed a motion seeking to have the special conditions of the January 4th injunction order voided by the Court. On the same date, Respondents filed a motion to amend the injunction order, requesting the district court amend the injunction order to replace the 55 db limitation with a 30' distance limitation.

On July 31, 2007, the district court entered the First Amended Order Granting Petition for

Injunction Against Harassment. The amended injunction order, inter alia, prohibited the Petitioners from "[c]ontacting, threatening, or harassing" the Respondents. The amended order also contained the following special conditions:

> (1) Respondents [Davies] shall not play any music, sermons, or anything else on a television, stereo, other sound reproduction device such that the sound can be heard thirty (30) feet or more away. The thirty (30) or more feet shall be measured from the point where the sound is audible (a) to the nearest part of the Davies residence, if the sound source is within the Davies residence, or (b) to the sound source, if that source is not within the Davies residence. Notwithstanding anything to the contrary, it shall not be a violation of this injunction with respect to sounds audible within the Davies property. (2) Respondents [Davies] shall not make any statements to any third party regarding the Petitioners [Moysas]; provided, however, that Respondents [Davies] may conduct business or file complaints with the homeowner's association.

The amended injunction order was effective from January 4, 2007 for a period of three years until January 4, 2010.

By separate orders entered on August 21, 2007, the District Court denied Petitioners' Motion for Relief from Order for Injunction, and granted

Respondents' Motion to Amend Order Granting Petition for Injunction Against Harassment.

On September 19, 2007, Petitioners filed their Notice of Appeal. On May 4, 2009, the Intermediate Court of Appeals of the State of Hawaii issued a Summary Disposition Order finding that special condition 1 of the amended injunction order was not overly broad or vague, did not violate Petitioners' right of free speech, did not restrict or regulate the content of the sound but rather the volume, and did not violate the Petitioners' right to privacy. The court further held that Petitioner Mirella M. Davies was not denied her due process rights. The court, however, did conclude that special condition 2 violated the Petitioners' free speech rights as it prohibited non-harassing speech.

A Motion for Reconsideration of the Summary Disposition Order was denied by the Intermediate Court of Appeals on May 11, 2009. Petitioners' Motion for Fees and Costs on Appeal was also denied.

The Petitioners subsequently filed an Application for Writ of Certiorari requesting that the Hawaii Supreme Court review that part of the Summary Disposition Order of the Intermediate Court of Appeals that concluded that the Davies' right of free speech was not violated by special condition 1 of the amended injunction order. Petitioners' application was accepted by the Hawaii Supreme Court, and the matter set for oral argument on September 3, 2009.

On October 2, 2009, the Hawaii Supreme Court issued a Summary Disposition Order concluding that since the Petitioners' did not timely appeal the July 31, 2007 amended injunction order, the ICA lacked jurisdiction to decide the issue of whether special condition 1, as amended, violated the Davies' right of free speech. As a result, the Supreme Court held that special condition 1, as amended, stood.

On October 12, 2009, the Petitioners filed a Motion for Reconsideration asking the Hawaii Supreme Court to reconsider its October 2nd Summary Disposition Order. By order filed on October 21, 2009, the Hawaii Supreme Court denied the Motion for Reconsideration. On October 22, 2009, the Judgment on Appeal was filed by the Hawaii Supreme Court.

On November 12, 2009, Petitioners filed a Petition for Writ of Mandamus with the Supreme Court of the State of Hawaii. On December 7, 2009, the Hawaii Supreme Court denied mandamus relief to the Petitioners.

On December 24, 2009, Petitioners filed this Petition for Writ of Certiorari.

II. Facts Relevant to the Petition

A. The appeal to the Intermediate Court of Appeals and the Supreme Court of the State of Hawaii arose from a dispute between neighboring home owners which led the filing of competing petitions for injunctions in the state district court.

On January 4, 2007, an Order Granting Petition for Injunction Against Harassment was issued in favor of Respondents [the Moysas], and against the Petitioners [the Davies]. The injunction order was entered by the district court after a lengthy hearing conducted over days which recounted repeated instances of harassing behavior by the Davies against the Moysas and others in the neighborhood which included the playing of music, religious sermons and other sounds at a loud volume for hours on end, Petitioner Mirella M. Davies staring and walking back and forth in front of the Respondents' property, and other bizarre behavior. Numerous witnesses, including various neighbors and contractors who were familiar with the Davies and their conduct, testified in support of the Moysas for issuance of an injunction. In contrast, the Davies called no corroborating witnesses to support their claims.

B. On July 3, 2007, Petitioners filed a motion seeking to have the special conditions of January 4th injunction order voided by the Court. On July 3, 2007, Respondents filed a motion to amend the injunction order to replace the 55 db limitation with a 30' distance limitation. Amendment of the injunction order was sought as a result of the Davies' challenging the order contending that state law required certification and training for use of a sound meter, and as a result of the police refusing to enforce the injunction order since the Moysas were not certified to operate a decibel meter. Since special condition 1 of the injunction order could not be enforced as written, and since the Davies continued to violate the order

with impunity[1] knowing they would not be subject to arrest for playing their music at an excessive volume, modification of the injunction order was necessary.

C. On July 31, 2007, the district court entered the amended injunction order enjoining the Petitioners from playing any music, sermons or anything else on a sound reproduction device that could be heard at a distance of 30' or more. By separate orders entered on August 21, 2007, the district court denied Petitioners' motion for relief , and granted Respondents' motion to amend order granting petition for injunction against harassment. The Petitioners appealed these orders.

III. The Opinions of the Hawaii Courts of Appeal

A. The May 4, 2009 Summary Disposition Order of the Intermediate Court of Appeals (Pet. App. F) concluded that the Petitioners' right of free speech was not violated by special condition 1 of the district court's July 31, 2007 amended injunction order, which was entered pursuant to a motion to

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[1] The record on appeal to the Intermediate Court of Appeals of the State of Hawaii demonstrated that the Davies repeatedly violated the injunction by playing there music and sermons, over and over, for hours at a time, on numerous days, at volumes which exceeded the decibel levels set forth in the injunction order. Visitors to the Moysas and their neighbors uniformly stated that the music or sermons were directed at the Moysas residence, it was played at an extremely loud volume, and occurred when the Moysas were home, in their yard or entertaining friends, and stopped when the Moysas left their home, clear evidence that the Davies were targeting their harassment in violation of the injunction order.

amend the original injunction order. The Summary Disposition Order also addressed issues raised by the district court's August 21, 2007 order denying Petitioners' motion for relief from the original injunction order. The July 31, 2007 amended injunction order amended special condition 1 (pursuant to the motion to amend) by changing the measurement of sound from decibels to distance. The July 31, 2007 amended injunction order disposed of all issues raised in the motion to amend and thereby left nothing further to be accomplished with regard to the amendment of special condition 1. As the Hawaii Supreme Court correctly concluded, the July 31, 2007 amended injunction order was final and appealable under *Hawaii Revised Statutes ("HRS")* § 641-1(a) (Supp. 2007). *See Ditto v. McCurdy*, 103 Hawai'i 153, 157-58, 80 P.3d 974, 978-79 (2003); *Chun v. Bd. of Trustees of E.R.S.*, 92 Hawai'i 432, 447-48, 992 P.2d 127, 142-43 (2000). (Pet. App. B) Likewise, the district court's August 21, 2007 order denying Petitioners' motion for relief was also final and appealable under *HRS § 641-1(a)*.

B. The time for appealing the July 31, 2007 amended injunction order commenced upon entry of the order, and not upon entry of the August 21, 2007 order granting the motion to amend. The Petitioners' September 19, 2007 notice of appeal was filed within thirty days after entry of the August 21, 2007 order denying the motion for relief, but more than thirty days after entry of the July 31, 2007 amended injunction order. While the September 19, 2007 notice of appeal timely appealed the August 21, 2007 order denying the motion for relief, it did not timely appeal the July 31, 2007 amended injunction

order. *See Hawai'i Rules of Appellate Procedure* ("HRAP") Rule 4.(a)(1). The timely filing of a notice of appeal in a civil case is a jurisdictional requirement that cannot be waived by the parties or disregarded by the appellate court in the exercise of judicial discretion. *See Bacon v. Karlin*, 68 Hawai'i. 648, 650, 727 P.2d 1127, 1128 (1986); HRAP 26(b). (Pet. App. B)

C. The Intermediate Court of Appeals ("ICA") further found, after careful review of the record and the briefs submitted by the parties, that special condition 1 of the amended injunction was not overly broad or vague, and did not violate the Petitioner's right of free speech. The restriction on the volume of sound from a device based upon that sound being audible 30 feet from the source does not necessarily violate free speech. Relying on the case of *State v. Ewing*, 81 Hawai'i 156, 914 P.2d 549 (App. 1996), where the ICA held that *Revised Ordinances of Honolulu (ROH)* § 41-31.1, which made it unlawful to play a device for sound reproduction from a vehicle at a volume audible from 30 feet from the source of the sound, was not overbroad so as to infringe upon free speech because it "does not regulate the content of the sound from the reproducing device." *Id.* at 164, 914 P.2d at 557. The court concluded that special condition 1 similarly did not restrict the content of the sound, but rather its volume citing *Cohen v. California*, 403 U.S. 15, 21, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971) ("government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue.") The ICA further concluded

that special condition 1 did not violate the Petitioners' right to privacy as a person cannot reasonably have a privacy interest in that which is exposed to the public. *State v. Augafa*, 92 Hawai'i 454, 465, 992 P.2d 723, 734 (App. 1999); *State v. Texeira*, 62 Hawai'i 44, 49, 609 P.2d 131, 135 (1980). Since special condition 1 only restricted sound that could be heard outside of the Petitioners' home, it did not interfere with their right to privacy. (Pet. App. F)

As to Mirella Davies being denied her due process rights, the ICA held that Ms. Davies was not denied due process of law because special condition 1 was of the kind prayed for in the demand for judgment. The Moysas prayed for injunctive relief against harassment and stated that the harassment included, inter alia, loud noise and music from the Davies' home. Since special condition 1 enjoined the Davies from engaging in the harassing behavior of creating noise audible in the Moysas home, it fell within the prayer for relief. The court further stated that even if special condition 1 did not fall within the relief prayed for, Mirella Davies was not prejudiced by the default since she was represented by counsel at all proceedings after January 4, 2007, who contested the validity of the special conditions. Thus, Mirella Davies had the opportunity to litigate her interest in this matter in spite of her default on January 4, 2007. Since special condition 1 did not violate the Davies' right to privacy, free speech, or due process, the court held that the imposition of special condition 1 was not an abuse of discretion.

D. The appeal to the appellate courts of the State of Hawaii did not include the two criminal arrests of Petitioner Mirella M. Davies for violating the amended injunction order. (Pet. App. F) The criminal cases are still pending in the Circuit Court of the First Circuit, State of Hawaii, CR. No. 07-1-1665 and CR. No. 07-1-1762. Accordingly, all reference to the criminal cases in the Petition, and Appendices G, H and I attached to the Petition, should be disregarded.

ARGUMENT

The decisions of the Hawaii appellate courts do not conflict with a decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioners have not carried their burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The Petition Should Be Dismissed for Lack of Jurisdiction by this Court.

A. This Court Lacks Jurisdiction Because the Issues Raised in the Petition are Moot.

Article III to the U.S. Constitution limits the jurisdiction of the federal courts to "actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). Jurisdiction is a threshold issue that "cannot be waived by the parties nor ignored by the courts." *California v. LaRue*, 409 U.S. 109, 113 n.3, 93 S. Ct.

390, 34 L. Ed. 2d 342 (1972). If there is no justiciable case or controversy, the court lacks subject matter jurisdiction and has no authority to act. *See, e.g., United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980).

The "case or controversy" doctrine underpins the doctrines of standing and mootness. *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 180, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). While the standing doctrine evaluates a litigant's personal stake at the onset of a case, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 at n.4, 112 S. Ct. 2130, 2141 at n.4. 119 L. Ed. 2d 351 (1992); *Robidoux v. Celani*, 987 F.2d 931, 938 (2d Cir. 1993), "the mootness doctrine ensures that the litigant's interest in the outcome continues throughout the life of the lawsuit." *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993) (citing *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396-97, 63 L. Ed. 2d 479, 100 S. Ct. 1202 (1980); *Etuk v. Slattery*, 936 F.2d 1433, 1441 (2d Cir. 1991)).

In general, "a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 59 L. Ed. 2d 642, 99 S. Ct. 1379 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 23 L. Ed. 2d 491, 89 S. Ct. 1944 (1969) (internal quotation marks omitted)). It is akin to saying that, although an actual case or controversy once existed, changed circumstances have intervened to destroy standing to the extent that the dispute is essentially ended and meaningful relief is no longer possible. 13A

Wright & Miller, *Federal Practice and Procedure* § 3533, p. 211; § 3533.3, p. 261 (2d ed. 1984). *See also Boals v. Gray*, 775 F.2d 686, 687, 696-97 (6th Cir. 1985).

When a dispute becomes moot, there no longer remains to be resolved a real, substantial controversy between parties having adverse legal interests. In such a situation, courts lack jurisdiction to resolve the merits of issues raised by the litigation; the dispute and issues have become hypothetical or abstract, and courts are not empowered to render empty advisory opinions that can have no effect upon the behavior of the parties toward each other. *Hall v. Beals*, 396 U.S. 45, 48 (1969); *International Union, UAW v. Dana Corp.*, 697 F.2d 718, 720-21 (6th Cir. 1983).

This Petition is based on Petitioners' objections to the terms of the amended injunction. Petition at p. i. The amended injunction order expired by its own terms on January 4, 2010. As of that day, Petitioners were no longer subject to the terms and conditions of the amended injunction. The dispute between Petitioners and Respondents is no longer a real, substantial controversy between parties having adverse legal interests. *International Union, UAW* , 697 F.2d at 720-21. Under the circumstances, this Court lacks jurisdiction to resolve the issues raised by the Petition. *Id.*

Under similar circumstances, courts have applied the mootness doctrine. For instance, in *Carrabus v. Schneider*, 111 F. Supp. 2d 204, 209-10 (E.D.N.Y. 2000), the Defendant County of Suffolk

and its personnel officer moved to vacate a temporary restraining order enjoining the County of Suffolk from hiring police officers. On May 17, 2000, the plaintiffs filed an order to show cause, seeking a preliminary injunction against the County barring it from hiring police officers. The order to show cause also contained a temporary restraining order pending the hearing on the preliminary injunction. The court granted the temporary restraining order on plaintiffs' application in so far as it sought to enjoin the hiring of officers, and set a hearing on the application for a preliminary injunction for May 22, 2000. *Id.* at 206. The District Court found that under New York law a temporary restraining order was good for 10 days unless extended by the court. *Id.* at 211. Based on this finding, the District Court found that Defendants' motion to vacate the state court temporary restraining order was moot, as it had previously expired under New York law. *Id.*

Similarly, in *Tex. Instruments Inc. v. U.S. Int'l Trade Comm'n*, 851 F.2d 342 (Fed. Cir. 1988), appellee International Trade Commission moved for dismissal on the grounds of mootness as part of appellant corporation's appeal that claimed error in the holding that appellant's patent was unenforceable. In 1986 Texas Instruments filed a complaint with the Commission charging nineteen different parties with violating United States tariff laws by importing computer chips. *Id.* at 343. Texas Instruments alleged that the chips were manufactured outside the United States and that they infringed on its patents, including the '543 patent. *Id.* An administrative law judge issued an initial determination, which the Commission

declined to review, allowing the determination to become final on September 21, 1987. *Id.* In its motion to dismiss for mootness, the Commission argued that even if Texas Instruments prevailed on appeal, the law provided for no remedy because (1) the '543 patent expired on November 17, 1987, and (2) Texas Instruments waived its right to appeal the invalidity and noninfringement issues because it appealed only the unenforceability issue. The District Court vacated that the portion of the Commission's final determination relating to the patent and remanded the case to the Commission with instructions to dismiss as moot the portion of the complaint relating to that patent. *Id.* at 344. In so holding, the District Court reasoned that the remedies sought by Texas Instruments were not applicable once the patent expired, and therefore, that portion of the appeal was moot. *Id.*

B. The Evading Review Exception to the Mootness Doctrine Does Not Apply in this Case.

Petitioners acknowledge the expiration of the Amended Injunction may result in their Petition being dismissed as moot. Petition at pp. 32-33. While Petitioners do not expressly argue that the evading review exception to the mootness doctrine applies, they imply the evading review exception should prevent dismissal of the Petition for mootness. Petition at p. 32. For the reasons discussed below, Respondents believe the evading review exception to the mootness doctrine does not apply.

In *Nat'l Parks Conservation Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 574 F. Supp. 2d 1314 (S.D. Fl. 2008), plaintiffs filed a suit, challenging the issuance of a permit extension by defendant United States Army Corps of Engineers, a modification, and a biological opinion, and alleging that the Corps of Engineers violated the Clean Water Act, the National Environmental Policy Act, the Endangered Species Act, and the Administrative Procedure Act. Plaintiffs argued that their claims fell under the long-recognized exception to the mootness doctrine for issues capable of repetition yet evading review, which allows a federal court to retain jurisdiction even though the issues may be technically moot. *Id.* at 1328. The District Court dismissed the case on mootness grounds, finding that plaintiffs' claims had been rendered moot by the June 11, 2007, expiration of the permit challenged in the action, and therefore, the case no longer presented a live case or controversy for which effective relief can be granted. *Id.* at 1316. The District Court found that in order for the "[evading review] exception to the mootness doctrine to apply, however, there must be a reasonable expectation that the same complaining party will be subject to the same injury again, and the injury suffered must be of a type so inherently limited in duration that it is always likely to become moot before a federal court can fully review it. *Id.* at 1328 (quoting *Spencer v. Kemna*, 523 U.S. 1, 17, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998)(internal quotation marks omitted)). The District Court found that the "evading review" prong of the test was not met because the five (5) year term and the one (1) year extension of the permit at issue provided more than

adequate time for complete judicial review, and therefore, plaintiffs had not demonstrated that the time between the issuance or extension of the permit and its expiration was always so short as to evade review. *Id.* at 1329. Likewise, the District Court found the "repetition" prong of the exception was not met because plaintiffs did not demonstrate a reasonable likelihood that the Corps of Engineers would authorize similar dredging and filling again. *Id.* at 1329-30.

In the case of *Pharmachemie B.V. v. Barr Laboratories, Inc.*,276 F.3d 627; 349 U.S. App. D.C. 284 (D.C. Cir. 2002), Defendant appealed an order of the United States District Court for the District of Columbia, granting summary judgment in favor of plaintiff, in plaintiff's action under the Federal Food, Drug, and Cosmetic Act. Defendant argued on appeal that the district court erred in vacating an administrative ruling of the Food and Drug Administration that defendant, as the first company to file a certification for a breast cancer drug, had a statutory right to 180 days of generic exclusivity. Plaintiff argued the case was moot, because it could no longer obtain the relief it sought in its complaint due to an adverse final judgment on the validity of a patent prevented plaintiff from marketing its generic drug before the patent expired. Defendant argued the appeal was not moot under the evading review exception to the mootness doctrine. *Id.* at 632. As the Court of Appeals noted:

> ...In the absence of a class action, the capable of repetition, yet evading review doctrine [is] limited to the situation where

> two elements combine[]: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. Under the evading review prong, the question is whether the challenged activity is by its very nature short in duration, so that it could not, or probably would not, be able to be adjudicated while fully live. Under the capable of repetition prong, there must be a reasonable expectation that the same complaining party would be subjected to the same action again. This prong requires that the same parties will engage in litigation over the same issues in the future. As the Second, Seventh, and Ninth Circuits have explicitly held, relying on constitutional grounds, there must be a reasonable degree of likelihood that the issue will be the basis of a continuing controversy between these two parties in order to ensure the existence of an ongoing controversy.

Id. at 632-33 (citations and internal quotation marks omitted). Under the evading review prong, defendant argued that judicial review was limited by the duration of the 180-day exclusivity period. *Id.* at 633. The Court of Appeals found the outcome of plaintiff's patent suit, not the 180-day limit on exclusivity, resulted in the case being moot. *Id.* Under the capable of repetition prong, the Court of Appeals

pointed out that several contingencies would have to occur for the same issues to arise again:

> (1) [defendant] must be the first to have filed an [abbreviated new drug application ("ANDA")] for a particular drug [for] certification; (2) plaintiff must later file an ANDA [for] certification for the same drug; and (3) there must be some basis for a dispute as to the exclusivity period because, for example, [defendant] wins a judgment invalidating the patent and the judgment is vacated, or [plaintiff] is able to market its generic version while an appeal of [defendant's] judgment invalidating the patent is pending, or [defendant] voluntarily converts its....certification.... While the combination of all of these contingencies is possible, [defendant] has not demonstrated a reasonable likelihood that they will occur.

Based on the foregoing, the Court of Appeals dismissed the appeal as moot, vacated the judgment of the district court, and remanded the case to the district court with instructions to dismiss the complaint. *Id.* at 634. The Court of Appeals found that plaintiff would be prevented from marketing its generic drug before the patent expired, whether it won or lost on appeal, thus, making the case moot on appeal and that defendant had failed to satisfy both prongs of the evading review exception. *Id.* at 631, 633.

Finally, in the case of *Haw. County Green Party v. Clinton*, 14 F. Supp. 2d 1198 (D. Haw. 1998), the District Court granted the defendants' motion to dismiss, and held that plaintiff's requests for injunctive and declaratory relief had been rendered moot by the cessation of the disputed sonar research and the expiration of the permit at issue. On June 8, 1998, plaintiff filed a motion requesting declaratory relief and issuance of a preliminary injunction, requesting the District Court: (1) order the National Marine Fisheries Service ("NMFS") to revoke the February 18, 1998 Amended Permit granted to Dr. Christopher Clark; and (2) enjoin the NMFS from issuing any future permits that would allow low-frequency active sonar tests and research ("LFA sonar research") in Hawaiian waters. *Id.* at 1199. The District Court held that plaintiff's request for injunctive relief was moot because Dr. Clark and the Navy had completed the sonar tests and research and had no plans to resume the tests; and Dr. Clark returned the permit to NMFS and requested its cancellation. *Id.* at 1201. The District Court rejected plaintiff's argument that the evading review exception to the mootness doctrine applied. *Id.* at 1202-03. In so holding, the District Court stated:

> In order for this exception to the mootness doctrine to apply, there must be a reasonable expectation that the same complaining party will be subject to the same injury again and the injury suffered must be of a type so inherently limited in duration that it is always likely to become moot before a federal court can fully review it. First, there is simply no reasonable

> expectation that the LFA sonar research will resume as the subject permit has expired. Second, the injury claimed here is not so limited in duration. Rather, [plaintiff] received a ruling on the merits regarding its motion for TRO. Finally, and most compelling, prior to the initiation of any future tests upon endangered species and the marine environment, Dr. Clark and the [defendants] would have to apply to the NMFS for a new research permit. Under these regulations, Dr. Clark is required to submit a draft Environmental Assessment to explain the proposed research and environmental effects. Thereafter, the NMFS must publish: (1) notice of the request; and (2) the submitted draft Environmental Assessment. A 30-day public review and comment period follows. The requisite 30-day period provides ample time and opportunity for Green Party to seek judicial review.

Id. at 1202-03 (citations and internal quotation marks omitted).

Similar to *Nat'l Parks Conservation Ass'n, Inc.*, *Pharmachemie B.V.* and *Haw. County Green Party*, the present case involves an amended injunction order, which expired by its own terms on January 4, 2010. As in *Nat'l Parks Conservation Ass'n, Inc.*, *Pharmachemie B.V.* and *Haw. County Green Party*, upon expiration of the amended injunction order, the Petition became moot and the Petition should be dismissed. Nor have Petitioners

demonstrated that the evading review exception to the mootness doctrine applies. In order for another injunction to issue against Petitioners, Respondents would have to file a new petition for temporary restraining order; personally serve the petition on Petitioners; and demonstrate at a proof hearing before the District Court of the State of Hawaii, that Respondents were entitled to another injunction. At the hearing, Petitioners would be able to produce evidence in opposition to the Petition. The "evading review" prong of the exception cannot be met by Petitioners because prior to the issuance of another injunction, the District Court of the State of Hawaii will have to review the petition for temporary restraining order and all evidence and testimony submitted in support and in opposition to the Petition. This is not a process that is so short or quick as to evade review. Likewise, Petitioners cannot meet the "repetition" prong of the exception because Petitioners have not demonstrated a reasonable likelihood that another injunction will be issued against them and in favor of Respondents. The likelihood of another injunction issuing against Petitioners is subject to the District Court process described above and its outcome is dependent on the facts and circumstances involved. There is no reasonable likelihood that the same conditions that Petitioners find objectionable will be contained in another injunction. Most importantly, Petitioners control whether another injunction is issued because it is their conduct that subjected them to the issuance of an injunction in the first instance.

II The Decision of the Intermediate Court of Appeals is Consistent with Decisions of This Court.

In *U.S. v. O'Brien*, 391 US. 367, 376, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968), this Court stated: "When speech and non-speech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." In *Clark v. Community for Creative Non-Violence*, 468 US. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984), this Court stated: "Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided they are justified without reference to the content of the regulated speech, that they are narrowly targeted to serve a significant government interest, and that they leave open ample alternative channels for communication of the information." This Court has also noted that local governments have "a substantial interest in protecting its citizens from unwelcome noise." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 US. 789, 806, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984). *See also Carey v. Brown*, 447 US. 455, 471, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980) (The government's interest in "protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.")

This Court has also described the right of residential privacy, i.e. the right of a citizen in his home to be free from the intrusion of unwanted speech, and the important governmental interest in protecting against such intrusion. *See Frisby v. Schultz*, 487 US. 474, 484-5, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988):

> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different ... A special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. (Citations omitted)

See also Kovacs v. Cooper, 336 US. 77,86-87,93 L. Ed. 513, 69 S. Ct. 448 (1949)("the unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to this interference with his privacy by loud speakers except through the protection of the municipality.")

In this case, the Intermediate Court of Appeals properly decided that the amended injunction order did not restrict any specific content of the Davies' music or noise. Given the content-

neutral nature of the amended injunction order, and its clear application to the interests of the Moysas, i.e. protecting the tranquility of their home against unwarranted intrusions by the Davies' loud music and sermons, and given the substantially unimpeded right of the Davies to play their music or sermons at a reasonable volume, thereby providing them an avenue of communication, the amended injunction order is presumptively valid. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986).

III. The Supreme Court of the State of Hawaii Correctly Concluded Petitioners' Appeal of the Amended Injunction Order Was Untimely.

The Petitioners' September 19, 2007 notice of appeal was filed more than thirty days after entry of the July 31, 2007 amended injunction order. The timely filing of a notice of appeal in a civil case is a jurisdictional requirement that cannot be waived by the parties or disregarded by the appellate court. *See Bacon v. Karlin*, 68 Haw. 648, 650, 727 P.2d 1127, 1128 (1986). Because the Davies' did not timely appeal the July 31, 2007 amended injunction order, the Intermediate Court of Appeals lacked jurisdiction to decide the issues raised by July 31, 2007 amended injunction order, specifically whether special condition 1, as amended, violated the Davies' right of free speech.

IV. The Hawaii Supreme Court Properly Found Petitioners Were Not Entitled to Mandamus Relief.

The Supreme Court to the State of Hawaii properly denied the Davies' petition for a writ of mandamus for the following reasons: (1) Petitioners' failed to secure appellate review of the July 31, 2007 amended injunction due to their counsel's failure to file a timely appeal did not entitle Petitioners to mandamus relief since Petitioners' district court proceeding was a civil case for which the constitutional right to the effective assistance of counsel did not apply; (2) Petitioners were not entitled to mandamus relief from the June 20, 2008 order denying the motions to dismiss Cr. No. 07-1-1665 and Cr. No. 07-1-1762 since Petitioner Mirella Davies chose not to apply for a writ of certiorari to review the dismissal of her interlocutory appeal; (3) Petitioners failed to demonstrate that the district court judge issued the July 31, 2007 amended injunction with the purpose of enjoining petitioners from conduct that did not constitute harassment within the meaning of *HRS* § 604-10.5 (a)(2); and (4) Petitioners were not entitled to mandamus relief since a writ of mandamus is an extraordinary remedy that will not issue unless the Petitioners demonstrate a clear and indisputable right to relief and a lack of alternative means to redress adequately the alleged wrong or obtain the requested action. *Kema v. Gaddis*, 91 Haw. 200, 204, 982 P.2d 334, 338 (1999). Petitioners have not shown compelling reasons to revisit the Hawaii Supreme Court's decision.

CONCLUSION

Petitioners have not established compelling reasons for this Court to grant the Petition. Accordingly, Respondents respectfully request the Petition be denied.

Respectfully submitted,

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